

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

76-6041

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No. 74 ~~Civ~~ 3992 76-6041

Court of Appeals of the United States
Second Circuit

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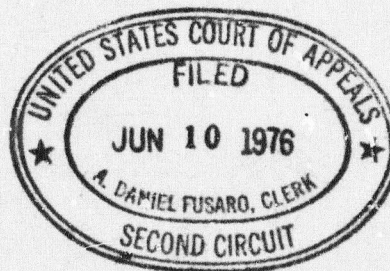
Michael McDevitt,
Plaintiff - Appellant,

--v--

Casper Weinberger, Secretary of Health
Education And Welfare

Brief for the Plaintiff - Appellant

and Appendix



COURT OF APPEALS OF THE UNITED STATES
SECOND CIRCUIT

MICHAEL MCDEVITT,

Plaintiff-Appellant,

76-6041
No. 74 ~~civ.~~ 3992

- v -

CASPER WEINBERGER, SECRETARY OF HEALTH,
EDUCATION AND WELFARE.

BRIEF FOR THE PLAINTIFF-APPELLANT

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ISSUES PRESENTED FOR REVIEW

1) Petitioner maintains that the Secretary of Health, Education and Welfare failed to properly apply the regulations promulgated under the Social Security Act in that the petitioner was "without fault" in the entitlement overpayment within the meaning of Social Security Regulation 404.510a.

2) Petitioner alleges that he was "without fault" within the meaning of Social Security Regulation 404.507 promulgated by the Department of Health, Education and Welfare and that the Secretary's decision should not stand since an improper legal standard was applied.

3) Petitioner maintains that the procedure used by the Social Security Administration to assess him for an overpayment based upon the operation of the pertinent portions of the applicable statutes of the Social Security Act, i.e., sections 216(i), 222(c), and 223 is constitutionally defective in that its operation denies him due process of law.

4) Petitioner maintains that he did not knowingly waive his right to be represented by counsel at the hearing

before the Administrative Law Judge and was also denied a fair hearing. Because of his inability to afford counsel he was substantially prejudiced in the hearing before the Administrative Law Judge and the Federal District Court; in the latter proceeding motion was rendered by summary judgment further attesting to the fact that petitioner's legal rights were substantially impaired.

5) Petitioner maintains that it was the affirmative duty and responsibility of the Administrative Law Judge to go into the issue of the equity of repayment and whether such repayment was against good conscience and equity and that the District Court did not have a lawful basis for concluding that the Administrative Law Judge's decision that recovery was not against good conscience was based upon substantial evidence.

STATEMENT OF THE CASE

Petitioner, a stone setter, suffered a skull fracture on April 28, 1967 and was subsequently found to be disabled as of that date. He received disability benefits thereafter. On May 6, 1969, his disability was found to be continuing, since he still suffered loss of hearing and vertigo*(Ex. 4). In June 1969, petitioner returned to work. Nevertheless, on July 15, 1969, examination revealed that he was still disabled and payments of disability benefits continued.

At the time of his first disability payment, McDevitt was informed that he was required to report all work activity (Ex. 10). Forms were provided to him for this purpose. Petitioner reported his work activity to the district office of the Social Security Administration on June 13, 1969 by mail and again in person on July 9, 1969. On January 22, 1970, plaintiff submitted work information on the forms provided. He indicated that he had worked from June 3, 1969 through August 22, 1969 and again from October 24, 1969 through January 20, 1970. He was still entitled to disability benefits, however, and his payments continued (Ex. 10 at 72).

In April of 1971, petitioner was contacted by letter requesting all work information since January 1970. Plaintiff answered that response, stating that he had returned to work on March 18, 1970 and had worked continually, with the exception of a two-month period. He further explained that he still suffered the symptoms of his disability and, as a result, had been reinjured in February 1971. The latter injury had resulted in his two-month work lapse.

At the hearing held before the Administrative Law Judge on September 15, 1973, petitioner claimed that he had reported his return to work in March 1970 as he had upon prior occasions. (That testimony, however, was in direct contradiction with an earlier signed form in which McDevitt stated that he had failed to report that return to work either because he believed it to be temporary or he had forgotten.) At the hearing, petitioner explained the earlier contradictory written statement as one exacted from him under pressure. The judge found "the preponderance of the credible evidence" revealed that petitioner had failed to notify the administrative office of his March 1970 return to work.

After an initial demand for repayment by the Social Security Administration (Ex. 6), McDevitt requested and received a review and reconsideration (Exs. 9 and 10). After unfavorable decisions, the case was heard de novo by an Administrative Law Judge who again found McDevitt at fault on January 30, 1974. That decision became the final decision of the Secretary when it was approved by the Appeals Council on May 21, 1974 (Tr. 6).

Petitioner brought an action in District Court to review the above determination that petitioner was at fault in creating an overpayment of \$1,921.20 in disability insurance benefits and argued that refund of any overpayment made to him should be waived as provided in 42 U.S.C. §404(b). Defendant was granted summary judgment based on the pleadings following the district court judge's decision to affirm the Administrator's findings as supported by substantial evidence.

*Ex. and Tr. refer to entries in the record of the hearing before the Administrative Law Judge.

SUMMARY OF THE ARGUMENT

Petitioner maintains that the Secretary of Health, Education, and Welfare failed to properly apply the regulations promulgated under the Social Security Act in seeking to recover an entitlement overpayment, and that the Secretary's decision should not stand since an improper legal standard was applied. Furthermore petitioner urges that the procedures used by the Social Security Administration in arriving at the determination assessing him for an entitlement overpayment are constitutionally defective because they denied petitioner due process of law by relying upon a retroactive cut-off date as to eligibility without adequately advising petitioner of his rights and responsibilities. In addition petitioner contends that his waiver of counsel was not knowingly and intelligently made, and that under the facts of the case, the Administrative Law Judge ought to have advised petitioner of the availability of legal services or Legal Aid. And as a final point, petitioner contends that the Administrative Law Judge also failed to properly examine the issue of the equity of repayment and thereby breached an affirmative

duty under the law. As a result of the foregoing, the District Court did not have a lawful basis for affirming the Administrative Law Judge's decision that recovery was not against good conscience and based upon substantial evidence.

POINT I

PETITIONER MAINTAINS THAT THE SECRETARY OF HEALTH, EDUCATION AND WELFARE FAILED TO APPLY THE REGULATIONS PROMULGATED UNDER THE SOCIAL SECURITY ACT IN THAT THE PETITIONER WAS "WITHOUT FAULT" IN THE ENTITLEMENT OVERPAYMENT WITHIN THE MEANING OF SOCIAL SECURITY REGULATION 404.510a AND THEREFORE THE SECRETARY'S DECISION SHOULD NOT STAND SINCE AN IMPROPER LEGAL STANDARD WAS APPLIED.

"Even if the factual findings of the Secretary of Health Education and Welfare are supported by substantial evidence, his ultimate decision may not stand if an improper legal standard was applied." *Herbst v. Finch* 473 F2d 771 (2d Cir. 1972) ; also *Nasser v. H.E.W.* 388 F. Supp. 58 (1975).

In addition, The Supreme Court has stated that:

"Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate a Congressional policy underlying a statute. Such review is always properly within the judicial province, and courts would abdicate their responsibility if they did not fully review such administrative decisions." *National Labor Relations Board v. Brown* 380 u.s. 278; 291-292 ; 85 Supreme Court 980, 988; 13 L. Ed. 2d 839 (1965), cited in *Nasser v. H.E.W.* 388 F. Supp 58, 62 (1975).

Petitioner McDevitt asserts that he was "without fault" in the entitlement overpayment because he relied on statements made to him by representatives of the Social Security Administration as to the determination of his eligibility to receive benefit payments. (See statements

made by petitioner at pages 4-5 and 26 of the transcript of the hearing before the Administrative Law Judge and also cited in the District Court's opinion on page 5.) Petitioner's statements attesting to his reliance on information supplied to him by representatives of the Social Security Administration as to the termination of his eligibility to receive disability payments were entered on the record and never controverted by representatives of the Social Security Administration. Petitioner maintains that his reliance on the representations made to him was reasonable with respect to the status of his eligibility and that in terms of this pertinent regulation, ... "such individual, in accepting such overpayment, will be deemed to be "without fault"." 20 CFR 404.510a(1975). Furthermore, petitioner maintains that "the Congressional policy underlying the Federal Social Security legislation requires the Court to interpret the Act liberally, and any doubts should be resolved in favor of coverage." *Rasmussen v. Gardner* 374 F2d 589, 594 (10 Cir. 1967) See also *Herbst v. Finch* 473 F2d 771 (2nd Cir. 1972) and *Nasser v. Secretary H.E.W.* 388 F.Supp. 58 (1975).

POINT II

PETITIONER ALLEGES THAT HE WAS "WITHOUT FAULT" WITHIN THE MEANING OF SOCIAL SECURITY REGULATION 404.507 PROMULGATED BY THE SOCIAL SECURITY ADMINISTRATION AND THAT THE SECRETARY'S DECISION SHOULD NOT STAND SINCE AN IMPROPER LEGAL STANDARD WAS APPLIED.

Petitioner contends that within the meaning of Regulation 404.507 he was "without fault" in accepting the overpayment since the Social Security Administration in making their determination as to his liability to refund a substantial amount of payments received failed to take into account his physical and mental condition at a time when petitioner's well-being, both physically and mentally, was very much in question. (See record transcript of hearing before Administrative Law Judge, pages 3, 4-5, 12-14.)

"In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition." 20 CFR 404.507 (1975)

Petitioner was sick throughout this entire period and subject to mental lapses, confusion and depression. The Administrative Law Judge and Social Security Administration in considering whether or not petitioner complied with Social Security provisions by sending in his card in March

of 1970 disregarded his medical and physical condition in determining that he failed to mail in his notice of employment card at this time. In this regard, petitioner points to the fact that "the Social Security Act is remedial and its humanitarian aims necessitate that it be construed broadly and applied liberally." *Gold v. Secretary* 463 F2d 38,41 (2nd Cir. 1972). Petitioner maintains that the failure of the Social Security Administration to apply the lawful standard of the Act to his own circumstances contravened the underlying purpose and aims of the Act.

"It is a familiar maxim of statutory interpretation that courts should enforce statute in such a manner that its overriding purpose will be achieved, even if the words used leave room for a contrary interpretation." *Haberman v. Finch* 413 F2d 664 (2nd Cir. 1969)

POINT III

PETITIONER MCDEVITT MAINTAINS THAT THE PROCEDURE USED BY THE SOCIAL SECURITY ADMINISTRATION TO ASSESS HIM FOR AN OVERPAYMENT BASED UPON AN OPERATION OF THE PERTINENT PORTIONS OF THE APPLICABLE STATUTES OF THE SOCIAL SECURITY ACT, I.E., SECTIONS 216(i), 222(c), AND 223 IS CONSTITUTIONALLY DEFECTIVE IN THAT ITS OPERATION DENIES HIM DUE PROCESS OF LAW.

The Social Security Act, 42 U.S.C. sections 301 et seq., is subject to scrutiny under standards of equal

protection. Jobst v. Richardson 368 F.Supp.909 (D.C. Mo. 1974). Petitioner McDevitt's interest in his disability benefits was a matter of statutory right and as such, "can only be disturbed through adjudicatory processes which comports with minimal standards of procedural due process." Frost v. Weinberger 375 F.Supp.1312 (D.C. NY 1974).

"What constitutes due process is not inflexible rubric and procedural protections demanded by it will vary according to factual circumstances of particular case and nature of right to be adjudicated." Frost v. Weinberger 375 F.Supp.1312, 1321.

A due process hearing must be held at a meaningful time and in a meaningful manner and "the opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard." Goldberg v. Kelly 397 U.S. 254, 268-269.

Petitioner maintains that the Secretary's determination that he was required to refund payments received was based upon a retroactive determination of a "cutoff date" as to eligibility and constituted a denial of petitioner's rights to due process. Petitioner maintains that he received no notice, either actual or constructive, that the disability payments paid to him during his "trial work

period" were conditional upon repayment or to be placed in escrow pending a subsequent determination as to his future potential liability (as assessed by the Bureau of Disability Insurance of the Social Security Administration). Petitioner maintains that the application of the procedure for the "trial work period" in accordance with sections 216(i), 222(c) and 223 of the Social Security Law is constitutionally defective in that the administrative determination as to eligibility for disability benefits and the termination of the "trial work period" necessarily places petitioner into jeopardy for future repayment for disability payments received because it is made under several onerous conditions. The administrative determination is made at an indeterminate future point in time with retroactive cut off effect during which period petitioner is not informed of a potentially damaging assessment for overpayment. Thus petitioner maintains that the due process clause of the 5th amendment is violated because petitioner does not receive any adequate notice prior to any termination of benefits because of the retroactive determinations made. Petitioner did not receive any notice from the Social

Security Administration that the disability payments received by him were subject to repayment based upon a subsequent administrative finding that the trial work period ended. Such subsequent determination was to be made sometime in the indeterminate future after the passage of a minimal nine month period. According to the procedures established by the Social Security Administration, upon the completion of a nine month period of work, whether it be consecutive or not, petitioner was to be notified that his trial work period had ended. Correspondingly, his eligibility for receiving disability payments would be deemed to have ended two months after he had resumed work, thereby subjecting him to an assessment for a minimum of seven months payments and required to be returned to Social Security Administration. Not only did this process produce an unreasonable and capricious result upon petitioner, but the record amply shows petitioner's own confusion as to when his eligibility payments were to cease. (See the transcript of the hearing before the Administrative Law Judge, pages 4-5, 26.) The district court judge pointed to petitioner's confusion in this regard as well on page five of his memorandum decision.

"Appropriate test of due process is whether a government regulation is unreasonable, arbitrary or capricious under the circumstances of the particular case." Berrigan v. Sigler (D.C. D.C. 1973) 385 F.Supp. 130, affirmed 499 F2d 514.

Petitioner maintains that the confusion cited above resulted from his reliance on statements made to him by the Social Security Administration representatives. Consequently when his actions are judged in light of the lawful standards of the Regulations 404.510a and 404.507, they would take his case out of the ambits of the decision in Morgan v. Finch 423 F2d 551, (where Morgan regularly received staffers with his Social Security checks directing that income from all sources should be included in annual reports to the Administration). Therefore petitioner takes exception to the District Court judge's finding that a finding of fault here can mean no more than finding of honest mistake. The problem presented here is quite different and therefore unlike Morgan v. Finch. Petitioner never received actual or constructive notice with the disability payment checks that they were "conditional" or "subject to return at a later date". Furthermore, the constitutional infirmity of the procedure utilized by the Social Security Administration in the application of the

relevant statutes to the petitioner, sections 216(i), 222(c), and 223 is endemic to the operation of the statute. According to the statute, there can be no determination of a cessation of eligibility until the recipient, petitioner McDevitt, has completed a "trial work period". The determination is made contingent upon recipient's ability to be gainfully employed for a period of nine months. During this "trial work period" petitioner's status is however clearly contingent (precarious) in that only on a day-to-day basis will he determine whether he is able to work on a succeeding day. The administrative determination is made at some point after a nine month period of employment passes, and when the determination is made it is adjudged to be retroactive to a prior "cut-off date", with a refund payment due for a period of a minimum of seven months (but usually longer). At no point was the petitioner made cognizant of this fact; the Social Security Administration never admitted such testimony into the record, namely that they advised petitioner that his payments were "conditional". "Fairness of procedure is due process in the primary sense." Fitzgerald v. Hampton (1972) 467 F2d 755, stay granted 93

S.Ct. 549, 409 U.S. 1055. Petitioner's right to disability benefits cannot be impaired by arbitrary governmental action in derogation of the due process clause of the 5th amendment. DeRodulfa v. U.S. (1972) 461 F2d 1240, cert. denied 93 S.Ct. 270, 404 U.S. 949. Petitioner maintains that the operation of the procedure assessing him for repayment is unreasonable, arbitrary and capricious in its effect on him in light of the lack of notice and that the basic unfairness of the procedure violates his constitutionally guaranteed rights to due process as secured under the 5th amendment.

POINT IV

PETITIONER MAINTAINS THAT HE DID NOT KNOWINGLY WAIVE HIS RIGHT TO BE REPRESENTED BY COUNSEL AND FURTHER THAT HE WAS NOT PROVIDED WITH A FAIR HEARING. BECAUSE OF HIS INABILITY TO AFFORD COUNSEL HE WAS SUBSTANTIALLY PREJUDICED AT HIS HEARING IN FRONT OF THE ADMINISTRATIVE LAW JUDGE. IN ADDITION, HIS LEGAL RIGHTS WERE FURTHER GREATLY IMPAIRED WHEN HIS CASE WAS REVIEWED BY THE DISTRICT COURT AND DECISION RENDERED BY SUMMARY JUDGMENT.

It has been clearly established that the hearings under the Social Security Act are non-adversary in nature. Blanscet v. Ribicoff 201 F.Supp 257 (W.D. Ark. 1962); and where Legal Aid and other legal services were available to plaintiff without cost, the Secretary of Health, Education

and Welfare should have notified plaintiff of this fact. Rosa v. Weinberger 381 F.Supp 377, 381 (1974) cited in Gold v. Secretary of H.E.W. 463 F2d 38, 43. While the facts presented in the Gold and Rosa cases were different, petitioner's remarks at the beginning of his hearing before the Administrative Law Judge indicate that his decision to appear pro se was not fully voluntary and knowing. An extract from the transcript appears below (page 24 of Court transcript).

Mr. McDevitt:

Well, the reason I didn't hire an attorney, your Honor, is because I can't afford one and there's really not much for me to present that I feel I need an attorney. Well, I mean, unless I could be advised differently -- unless there's some facts here that I don't know about.

Administrative Law Judge: Well, you're going to have to make the decision. I can't.

Mr. McDevitt:

I'm -- I'm making the decision to be by myself.

Petitioner's replies to the Administrative Law Judge underscore his uncertainty and confusion as to his necessity for counsel. His waiver of counsel was far from knowing and completely voluntary and could not constitute a complete waiver. Under the circumstances of this case, petitioner's

presentation of the facts leading to a determination that he was not "without fault" hinged upon the statutory interpretation of the regulations of the Social Security Administration as to what constitutes "fault". The legal sense in which these regulations were construed as applied to petitioner went well beyond the ordinary common sense understanding of these terms available to petitioner as to whether or not his acts were "with or without fault". Petitioner's lack of legal counsel and the omission by the Administrative Law Judge to advise petitioner to seek counsel resulted in an unfair hardship in the presentation of his case and a denial of a fair hearing on the issues of fact and law presented. An extreme example of such prejudice to petitioner's case was the Administrative Law Judge's use of petitioner's reply to a "Without Fault" questionnaire as an admission and legal cornerstone for his findings that petitioner was liable for repayment of an overpayment received. Petitioner was never advised of his legal rights when requested to fill out the questionnaire, nor that it constituted an admission of fault on his part, and that it would later be used as a basis for a claim as to a subsequent determination of a liability for repayment. Further-

more, it is not clear from the record as to whether petitioner would have been exposed to further sanctions had he not completed the "Without Fault" questionnaire. In addition, the District Court Judge pointed out that petitioner was never in a position to offer an explanation for the discrepancies relied upon by the Administrative Law Judge when he examined petitioner's financial records.

As a result of the above acts, petitioner was plainly denied his substantial rights of due process under the law. Upholding such a determination would contravene the spirit and substance of the American legal system. It has been well stated by a respected U.S. District Court Judge that:

"It is time to move the delivery of legal services into the twentieth century. It is time that we realized the American ideal of justice for all by making legal resources available to all our citizens." (Judge Jack B. Weinstein, New York Law Journal, May 2, 1974.)

POINT V

PETITIONER MAINTAINS THAT IT WAS THE AFFIRMATIVE DUTY AND RESPONSIBILITY OF THE ADMINISTRATIVE LAW JUDGE TO GO INTO THE ISSUE OF THE EQUITY OF REPAYMENT AND WHETHER SUCH REPAYMENT WAS AGAINST GOOD CONSCIENCE AND EQUITY, AND THAT THE DISTRICT COURT DID NOT HAVE A LAWFUL BASIS FOR CONCLUDING THAT THE ADMINISTRATIVE LAW JUDGE'S DECISION THAT RECOVERY WAS NOT AGAINST GOOD CONSCIENCE WAS BASED UPON SUBSTANTIAL EVIDENCE.

The Administrative Law Judge relied upon discrepancies in petitioner's financial records without affording petitioner an opportunity to offer an explanation or rebut any of the discrepancies relied upon by the Administrative Law Judge. The Administrative Law Judge elicited no testimony in the record from petitioner McDevitt as to the various claims upon him for repayment of debts as to the degrees of urgency in repayment and merely presumed that his relatives would not be so insistent as to deprive petitioner of food, clothing and shelter. The Administrative Law Judge was under an affirmative duty to make such inquiries as to petitioner's debt repayment schedule and not simply rely upon bald assumption. Petitioner contends that he was denied a fair hearing by the Administrative Law Judge under the regulations and the beneficent purposes of

the Social Security Act as interpreted under the guidelines developed in Gold v. H.E.W. 463 F2d 38 at 43-44 and Rosa v. Weinberger 381 F.Supp 377 1974. The District Court, based upon the records before it, could not factually and lawfully conclude that the Administrative Law Judge had gone into the issue of whether or not repayment was in accord with good conscience and equity and therefore the District Court failed to meet the statutory criteria which requires the affirmative finding that an order of repayment is not against good conscience and equity. (20 CFR 404.506 and 20 CFR 404.508.)

CONCLUSION & RELIEF REQUESTED

- 1) Petitioner was "without fault" within the meaning of Social Security Regulation 404.510a.
- 2) Petitioner was "without fault" within the meaning of Social Security Regulation 404.507 since an improper legal standard was applied.
- 3) Petitioner was denied substantive due process in the application of Sections 216(i); 222(c) and 223 of the Social Security Act.
- 4) Petitioner was denied a fair hearing in that he was not given the opportunity to be represented by counsel at the hearing before the Administrative Law Judge.
- 5) The finding by the Administrative Law Judge and the District Court that repayment was not against good conscience and equity was factually inaccurate and unlawfully applied.

Petitioner requests a dismissal of the District Court Judge's grant of summary judgment to defendant and that the order of the district court be reversed and that the relief requested by petitioner in District Court be granted, to wit, that refund of any overpayment made to him should be waived as provided in 42 USC Section 404(b).

Respectfully submitted
Michael McDevitt,
Plaintiff-Appellant

LAW & REGULATIONS

Section 216(i) of the Social Security Act, 42 U.S.C. 416(c) as pertinent herein, provides for the establishment of a period of disability and, in effect, that such period shall end with the close of the last day of the second calendar month following the month in which the disability ceases.

Section 223 of the Act, 42 U.S.C. 423 as pertinent herein, provides for the payment of disability insurance benefits and, in effect, that entitlement to such benefits shall end with the close of the second month following the month in which the disability ceases.

Section 222(c) of the Social Security Act, 42 U.S.C. 422(c) as pertinent herein, provides for the establishment of a trial work period beginning with the first month of entitlement and ending with the ninth month in which services are rendered (whether or not such nine months are consecutive).

Section 204(b) of the Social Security Act, 42 U.S.C. 402(b) as pertinent herein, states:

"In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from any person who is without fault if such adjustment or recovery would defeat the purpose of this title or be against equity and good conscience.

SOCIAL SECURITY REGULATIONS

A) Section 404.1539(a)(2) of the Social Security Regulations No. 4 provides in effect that a claimant's disability shall be found to have ceased in the month in which the individual has regained his ability to engage in substantial gainful activity.

B) Section 404.506 When waiver of adjustment or recovery may be applied.

Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under title II (old-age, dependent's, survivor's and disability insurance benefits) or under title XVIII (hospital and supplementary medical insurance benefits) has been made (including a payment under section 1814(e) of the Act) with respect to an individual:

- (a) Who is without fault and
- (b) Adjustment or recovery would either:

- (1) Defeat the purpose of title II of the Act, or
- (2) Be against equity and good conscience.

(32 F.R. 18026, Dec. 16, 1967)

c) Section 404.507 Fault.

"Fault" as used in "without fault" (see sections 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education and physical and mental condition. What constitutes fault (except for "deduction overpayments" -- see section 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act, resulted from:

(a) An incorrect statement made by the individual which he know or should have known to be incorrect; or

(b) Failure to furnish information which he know or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

(34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646, Oct. 9, 1969)

D) Section 404.508 Defeat the purpose of Title II.

(a) General. "Defeat the purpose of Title II" for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under

title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) When adjustment or recovery will defeat the purpose of title II. Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

(32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969)

B) Section 404.510a When an individual is "without fault" in an entitlement overpayment.

A benefit payment under title II or title XVIII of the Act to or on behalf of an individual who fails to meet

one or more requirements for entitlement to such payment or a benefit payment exceeding the amount to which he is entitled, constitutes an entitlement overpayment. Where an individual or other person on behalf of an individual accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II or title XVIII of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto, or where an individual or other person on behalf of an individual is overpaid as a result of the adjustment upward (under the family maximum provision in section 203 of the Act) of the benefits of such individual at the time of the proper termination of one or more beneficiaries on the same social security record and the subsequent reduction of the benefits of such individual caused by the reentitlement of the terminated beneficiary(ies) pursuant to a change in a provision of the law, such individual, in accepting such overpayment, will be deemed to be "without fault". For purposes of this section "governmental

agency" includes intermediaries and carriers under contract pursuant to sections 1816 and 1842 of the Act.

(39 F.R. 43716, Dec. 18, 1974)

30 Sickles Street
New York, N.Y. 10040
June 2, 1976

Court of Appeals of United States
Second Circuit
No. 74 Civ. 3992

Re: Present financial status

To those who shall pass judgement:

I would like the following information to be taken under consideration if at all possible. My income for the years which was not made available to you is:

1973.....	\$7521.90
1974.....	\$5258.75
1976.....	\$ 946.23

At present, I have no income whatsoever due to the fact that my Unemployment Insurance Benefits have expired. I went to apply for Public Assistance to seek help for my family which consist of four people. I was informed that my family has to sell our 1971 Pinto Ford, until then we are not eligible for Public Assistance. I am in the process of selling stated car at this time.

Attached is a letter from the Department of Income Maintenance; also, my insurance book calendar insert.

I understand that a false statement in respect to my financial status will subject me to the penalties for perjury.

Respectfully,

Michael McDevitt
Michael McDevitt

Subscribed and Sworn to before me this .. 2.....

day of June 1976.....
[Signature]
Qualified in New York County
Commission Expires March 30, 1977

INSURANCE BOOK CALENDAR INSERT-LO 318 2 (3-75)

S.S.A. No.		1 0 2 3 4 4 8 0 1							INSURANCE					EMPLOYMENT			
WEEK	MON	TUE	WED	THU	FRI	SAT	SUN	WEEKLY EARN.	EFF. DAYS	ACTION REQD.	PAY NO.	INIT.	DATE	U.I. COMMENTS OR ACTION TAKEN	DATE TO REPORT	DATE RECD.	INIT.
13	22	23	24	25	26	27	28		4	off	70	A		to 611			
14	29	30	31	1	2	3	4		4	off	71	A		to 611			
15	5	6	7	8	9	10	11		4		22	A					
16	12	13	14	15	16	17	18		4		23	A					
17	19	20	21	22	23	24	25		4		24	A					
18	26	27	28	29	30	31	1		4		25	A					
19	2	3	4	5	6	7	8		4		26	A					
20	9	10	11	12	13	14	15										
21	16	17	18	19	20	21	22										
22	23	24	25	26	27	28	29										
23	30	31	1	2	3	4	5										
24	6	7	8	9	10	11	12										
INSURANCE																	
EMPLOYMENT																	
25	14	15	16	17	18	19	20										
26	21	22	23	24	25	26	27										
27	28	29	30	1	2	3	4										
28	5	6	7	8	9	10	11										
29	12	13	14	15	16	17	18										
30	19	20	21	22	23	24	25										
31	26	27	28	29	30	31	1										
32	2	3	4	5	6	7	8										
33	9	10	11	12	13	14	15										
34	16	17	18	19	20	21	22										
35	23	24	25	26	27	28	29										
36	30	31	1	2	3	4	5										
37	6	7	8	9	10	11	12										
38	13	14	15	16	17	18	19										
39	20	21	22	23	24	25	26										
INSURANCE																	
EMPLOYMENT																	
40	24	25	26	27	28	29	30										
41	31	1	2	3	4	5	6										
42	7	8	9	10	11	12	13										
43	14	15	16	17	18	19	20										
44	21	22	23	24	25	26	27										
45	28	29	30	1	2	3	4										
46	5	6	7	8	9	10	11										
47	12	13	14	15	16	17	18										
48	19	20	21	22	23	24	25										
49	26	27	28	29	30	31	1										

Fill in all cells for each week.
 I DID NO WORK AT ALL OR WAS MARKED "O" (OFF) BECAUSE OF SICKNESS OR OTHER REASONS ON DAYS MARKED "O".
 I WAS NOT WILLING OR ABLE TO WORK BECAUSE OF SICKNESS OR OTHER REASONS ON DAYS MARKED "O".
 I RECEIVED OR WILL RECEIVE HOLIDAY OR VACATION PAY FOR DAYS MARKED "P" (PAY).
 * AMOUNTS ARE MY WEEKLY EARNINGS BEFORE DEDUCTIONS AND INCLUDE TIPS AND VALUE OF ROOM AND BOARD.



DEPARTMENT OF INCOME MAINTENANCE

Center: DYCKMAN
Address: 4660 Broadway

NOTICE OF NON-ACCEPTANCE

MICHAEL McDEVITT 7
30 SICKLES STREET
APT 1111

NEW YORK, N.Y. 10040 1

After careful consideration of your application for

Public Assistance
(category of assistance)

we find that you are not eligible for public assistance for the following reasons:

You have available Resources - Car

If you do not agree with the above, you may wish to review the Form M-49 (Civil Rights Act of 1964 and the Right to a Fair Hearing) which was given to you at the time of your application. It explains your rights with respect to a review of this decision.

You may, however, be eligible for Medical Assistance as provided by the New York State Medicaid Program and for enrollment in the Food Stamp Program. Attached is a listing of Medicaid and Food Stamp Offices for your use if you wish to apply for one or both of these programs.

[Signature]
IM Supervisor

5/27/76
Date

579-7363
Telephone Number

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
MICHAEL McDEVITT,

Plaintiff,

--against--

CASPAR WEINBERGER, Secretary of
Health, Education and Welfare,

Defendant.
----- x

#43181
74 Civ. 3992

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

Petitioner McDevitt brings this action to review a final determination by the Secretary of Health, Education and Welfare ("H.E.W.") that petitioner was at fault in creating an overpayment of \$1,921.20 in disability insurance benefits.^{1/} Petitioner argues that refund of any overpayment made to him should be waived as provided in 42 U.S.C. §404(b):

In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is

^{1/} After an initial demand for repayment by the Social Security Administration (Ex. 6), McDevitt requested and received a review and reconsideration (Exs. 9 and 10). After unfavorable decisions, the case was heard de novo by an administrative law judge who again found McDevitt at fault on January 30, 1974. That decision became the final decision of the Secretary when it was approved by the Appeals Council on May 21, 1974 (Tr. 6).

without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity or good conscience.

Defendant has moved for judgment on the pleadings. Since we feel constrained to conclude that the determination was supported by substantial evidence, 42 U.S.C. §405(g), see Herbst v. Finch, 473 F.2d 771 (2d Cir. 1972), we must grant — defendant's motion and affirm the Administrator's finding.

Petitioner, a stone setter, suffered a skull fracture on April 28, 1967 and was subsequently found to be disabled as of that date. He received disability benefits thereafter. On May 6, 1969, his disability was found to be continuing, since he still suffered loss of hearing and vertigo (Ex. 4). In June 1969, petitioner returned to work. Nevertheless, on July 15, 1969, examination revealed that he was still disabled and payments of disability benefits continued.

At the time of his first disability payment, McDevitt was informed that he was required to report all work activity (Ex. 10). Forms were provided to him for this purpose. Petitioner reported his work activity to the district office of the Social Security Administration on June 13, 1969 by mail and again in person on July 9, 1969. On January 22, 1970, plaintiff submitted work information on the forms provided. He indicated that he had worked from June 3, 1969

through August 22, 1969 and again from October 24, 1969 through January 20, 1970. He was still entitled to disability benefits, however, and his payments continued (Ex. 10 at 72).

In April of 1971, petitioner was contacted by letter requesting all work information since January 1970. Plaintiff answered that response, stating that he had returned to work on March 18, 1970 and had worked continually, with the exception of a two-month period. He further explained that he still suffered the symptoms of his disability and, as a result, had been reinjured in February 1971. The latter injury had resulted in his two-month work lapse.

At the hearing held before the administrative law judge on September 15, 1973, petitioner claimed that he had reported his return to work in March 1970 as he had upon prior occasions. That testimony, however, was in direct contradiction with an earlier signed form in which McDevitt stated that he had failed to report that return to work either because he believed it to be temporary or he had forgotten. At the hearing, petitioner explained the earlier contradictory written statement as one exacted from him under pressure. The judge found "the preponderance of the credible evidence" revealed that petitioner had failed

to notify the administrative office of his March 1970 return to work.

We cannot say the judge's finding was without substantial evidence. The judge apparently relied heavily upon certain "discrepancies" in the record concerning the amount of income petitioner received and the amount of rent he paid. Some weight was also given to the absence of a work notification form from petitioner in the Administration's files. Finally, the judge had an opportunity to assess petitioner's demeanor at the hearing to evaluate his credibility which we, of course, are unable to do.

In granting defendant's motion, however, we observe that we would not necessarily have reached the same result upon the transcript and documentary evidence before us. We are impressed by certain elements in the record. First, we note the apparent forthrightness with which plaintiff volunteered to the judge at the hearing that his rent was less than the record indicated; also the accuracy with which petitioner reported his previous employment to the Administration. In addition, when McDevitt received the questionnaire in April 1971, he reported all his employment from the January 1970 time requested. The judge drew an adverse inference from McDevitt's report. He thought that McDevitt at this point "might" have realized that his March 1970 work report had

not been received, since the April 1971 request for information asked for all information since January of 1970. It seems to us that the judge expected too much of petitioner in this regard.

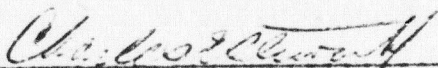
The most troublesome aspect of the case to us, however, is the demonstrated confusion in petitioner's mind concerning when he should or should not receive benefit payments. Before March 1970, McDevitt had sent in two work reports and, nevertheless, had continued to be entitled to and to be paid benefits. McDevitt apparently was aware that he was eligible to be paid benefits during a trial work period, but clearly had no idea how long that period should last. "I didn't know if I was going to get 9 or 2 years trial work period or 6 months, I had no idea." (Tr. at 4-5). He testified that he understood the period of benefit payments would be determined by the doctors who gave him periodic check-ups. He also testified that he telephoned the district office from time to time and enquired about his doctor appointments and was told not to worry "they'll notify you. They have you on record - you will be notified." (Tr. at 26).

Finally, we note that the judge's reliance upon the discrepancies between petitioner's written monthly income estimates and the social security record of income (compare

exs. 20 and 35), while certainly not improper, is, to our mind, unfortunate. At the end of the hearing, the judge asked McDevitt whether he objected to the judge's use of McDevitt's financial records without McDevitt having an opportunity to review them. Petitioner replied the judge was "more than welcome" to see his records. McDevitt was never in a position, therefore, to offer an explanation for the discrepancies relied upon by the judge.

Despite all of the above reservations which this court has concerning the Secretary's decision in this case, we are bound by the statutory standard provided in 42 U.S.C. §405(g); we cannot say that decision was not based upon "substantial evidence." We therefore affirm that finding. We note for petitioner's benefit, however, that a finding of "fault" here in creating the overpayment can mean no more than a finding of "honest mistake." Morgan v. Finch, 423 F.2d 551, 553 (6th Cir. 1970). We think such is the case here.

SO ORDERED.



United States District Judge

Dated: New York, N. Y.
September 30, 1975.

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Robert B. Fisher Jr.
UNITED STATES ATTORNEY
6/2/76